> and Vogel. Accordingly, Hornyak and Vogel are entitled to entry of judgment in their favor on all claims solely on the basis of the *Noerr/Pennington* defense.

See Pet. App. at 77a-78a n. 24.

The Court also dismissed Count I against Hornyak and Vogel on the merits:

> There is no dispute that Hornyak and Vogel were compensated by Bobrick based upon the amount of Bobrick product they sold. There also appears to be no dispute that Hornyak and Vogel exclusively sold Bobrick toilet partitions. It is thus clear that there exists in this case the requisite unity of economic interests that renders Hornyak and Vogel incapable of conspiring with Bobrick. *See Peerless Heater Co. v. Mestek, Inc.*, 2000 U.S. Dist. LEXIS 6664, No. Civ. A. 98-CV-6523, 2000 WL 637082, at *6 (E.D. Pa. May 11, 2000).
>
> * * *
>
> Santana also appears to claim that Hornyak and Vogel may be held liable because they were aware of the role that Formica and others played in the alleged conspiracy. The evidence that Santana cites in support of this contention shows only that Hornyak and Vogel conducted anti-HDPE marketing, including showing the Formica video and burning samples of HDPE, in order to sell Bobrick products. In other words, Hornyak and Vogel were advancing the cause of their corporate principal. There is no evidence that

> either Hornyak or Vogel assisted the efforts of other TPMC members [alleged conspirator manufacturers]. Indeed, Santana has not cited any evidence indicating that Hornyak and Vogel had any contact with Formica or the TPMC members. At most, Hornyak and Vogel were aware of the role of Formica in developing the Formica video.... Such evidence is insufficient to show the requisite unity of purpose, common design and understanding, or meeting of the minds in an unlawful arrangement that animates § 1 liability. Accordingly, Vogel and Hornyak are entitled to summary judgment on Santana's § 1 claim.

See Pet. App. at 98a-99a (emphasis added).

On February 9, 2005, the Court of Appeals for the Third Circuit affirmed the District Court's entry of summary judgment with regard to all defendants. *See* Pet. App. at 1a-32a. With regard to Hornyak and Vogel, the Third Circuit stated:

> Santana contends that the District Court erred when it held that the *Noerr/Pennington* doctrine ... shielded Bobrick, Hornyak, and Vogel from liability under § 1 of the Sherman Act. As to this claim, however, there is no need to decide whether Bobrick, Hornyak, and Vogel are entitled to immunity under the *Noerr/Pennington* doctrine. Even if they were entitled to immunity, Santana's § 1 claim fails because we conclude that there has been no restraint of trade.
>
> * * *

> The District Court held that Santana proved the concerted action element as to Bobrick, and Bobrick does not challenge this finding. Santana, however, does appeal the District Court's conclusion that it did not prove concerted action as to Hornyak and Vogel. Santana seeks to hold Hornyak and Vogel liable under § 1 based on their relationship and interaction with Bobrick. Hornyak and Vogel argued to the District Court that they were incapable of conspiring with Bobrick as a matter of law because they sold Bobrick's products exclusively. The court, relying on the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), and our decision in *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125 (3d Cir. 1995), held that, as a matter of law, Hornyak and Vogel were incapable of conspiring. 249 F. Supp. 2d at 505-06.
>
> As with the *Noerr/Pennington* issue, we do not need to resolve this question because, even if we were to hold Santana did prove concerted action as to Hornyak and Vogel, Santana's § 1 claim would still fail.

See Pet. App. at 11a-13a n.14.

On August 8, 2005, Petitioner filed its petition for *certiorari*. Therein, other than listing Hornyak and Vogel as parties, Petitioner did not mention either Respondent Hornyak or Respondent Vogel by name, nor articulate how, in Petitioner's 27-page petition, their conduct caused a restraint of trade.

REASONS FOR DENYING THE PETITION

Petitioner has manufactured a false conflict among the circuits by overstating and misstating the holding of the Third Circuit in this case. The Third Circuit simply held that commercial speech (even if intentionally false), that criticizes a competitor's product to consumers, does not constitute a *per se* restraint of trade in violation of Section 1 of the Sherman Act, absent proof of coercion or an enforcement device.

Petitioner's legal authorities in support of its claimed conflict all involved something more than product disparagement to consumers. Those cases are also all distinguishable because they involved conduct targeting individuals who had the ability to limit the supply of the product in the marketplace to consumers. Here, Petitioner alleged intentionally false product disparagement made directly to consumers, but adduced no proof of coercion or any enforcement device to restrict or impede those consumers' choices.

In addition, the Third Circuit did not rule as a matter of law that an agreement among competitors to exclude one competitor's product from the marketplace through a campaign of intentional product disparagement is never in restraint of trade. In fact, the Third Circuit was crystal clear in this unanimous section of its Opinion to explain that Petitioner was not excluded from the marketplace by any of Respondents' conduct.

Specifically, the Third Circuit held that "the alleged exclusionary conduct required the active approval of the consumer," and "the decision to specify was always ultimately in the hands of the consumer." *See* Pet. App. at 15a (quoting *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F. 3d 518 (5th Cir. 1999)). The Court expressly concluded

"the plaintiff was not excluded from competition" after noting the absence of any evidence that Petitioner was prevented from presenting its arguments at the specifications phase of the competitive bidding process. *Id.*

Petitioner had asserted that Respondents' conduct constituted a group boycott and as such, a *per se* violation of Section 1 of the Sherman Act, thereby abandoning any claim under the Rule of Reason. *See* Pet. App. at 119a n.46. *See also id.* at 104a-109a. Accordingly, Petitioner must establish that intentionally false disparagement of a competitor's product constitutes a *per se* violation of the Sherman Act.

Per se treatment is appropriate only where the purpose and effect of the challenged conduct threaten the proper operation of a free market economy or where the "practice facially appears to be one that would always or almost always tend to restrict competition and restrict output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979). No court has treated isolated false disparagement as *per se* illegal under Section 1. To be sure, no court has held that an isolated claim of intentionally false product disparagement, unaccompanied by coercion or some enforcement device, even violates the Rule of Reason. False statements about a competitor's product are already prohibited by the 1988 amendments to the Lanham Act, the 1938 amendments to the FTC Act and state laws, which do not require a showing of restraint of trade, as does the Sherman Act. *See* 15 U.S.C. §§ 1, 5, 1125(a).

Petitioner is also incorrect when it claims the Third Circuit's holding conflicts with the antitrust position of the United States. In the nine years of litigation in this case, no governmental entity has opted to investigate Petitioner's allegations, or to join in at the district court or court of appeals.

The antitrust position of the United States has sought to limit broadening of the scope of the United States antitrust laws, in order to not interfere with procompetitive conduct. *See Texaco, Inc. v. Dagher*, Nos. 04-805 and 04-814; *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905; *Illinois Tool Works v. Independent Ink*, No. 04-1329. There, the United States argued the antitrust laws should not be expanded to cover allegedly actionable conduct or make such conduct *per se* illegal.[4]

Moreover, this case is a poor choice to resolve any claimed conflict because the facts do not raise antitrust concerns. After three years of discovery, the record contains no proof of either increased prices or reduced output, increased or reduced market share or harm to competition. To the extent that Petitioner's characterization of the facts of this case is to the contrary, it is unsupported by the record cited by Petitioner.

Finally, the Third Circuit's analysis of Petitioner's claims complied with *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962) because the Court considered the Respondents' allegedly intentionally false marketing campaign against HDPE partitions in the context of all the other conduct alleged in support of Petitioner's Section 1 claim. *See* Pet. App. at 8a, 13a-14a. The Third Circuit concluded that no "restraint" was shown in all of this combined activity.

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[4] *See* Brief for the United States as Amicus Curiae Supporting Petitioners in *Texaco, Inc. v. Dagher*, Nos. 04-805 and 04-814, dated September 2005; Brief for the United States as Amicus Curiae in *Illinois Tool Works v. Independent Ink*, No. 04-1329, dated August 2005; Brief for the United States as Amicus Curiae Supporting Petition, dated May 20, 2005, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 2004 U.S. Briefs 905.

CONCLUSION

For all the above reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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October 20, 2005

(4)

No. 05-185

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IN THE

Supreme Court of the United States

SANTANA PRODUCTS, INC.,
Petitioner,

v.

BOBRICK WASHROOM EQUIPMENT, INC.,
BOBRICK CORPORATION, HORNYAK GROUP, INC.,
AND VOGEL SALES CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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November 1, 2005

CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page ii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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REPLY BRIEF FOR PETITIONER

All of the major circuits have now weighed in on whether false disparagements of a competitor's product can ever be an element or evidence of an antitrust claim. The Third Circuit decision below takes the minority view, holding that petitioner's "allegations of fraud in the manner in which the hazards of HDPE were portrayed are *irrelevant*." Pet. App. 14a (emphasis added). That holding, which sides with the Fifth and Seventh Circuits, simply cannot be squared with decisions of the Second, Sixth, Eighth, and D.C. Circuits. The Eighth Circuit, for example, holds that the falsity of a competitor's statements about a product "*must* be considered in determining whether or not an unreasonable restraint of trade occurred." *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1264 (8th Cir. 1980) (emphasis added). *See also* Pet. 8-12. The importance of the question presented is reflected, in part, by the position the United States has taken that an agreement among competitors "'to publish false information'" to exclude rivals enjoys "'no First Amendment immunity from the Sherman Act.'" Pet. 22 (quoting Brief for the United States as Amicus Curiae at 15-16, *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 96-1792, 1996 WL 33420204 (3d Cir. filed Oct. 28, 1996)).

Respondents resort to mischaracterizations of petitioner's arguments and of the cases in an effort to avoid this Court's review. Respondents falsely assert that petitioner seeks a "*per se*" rule of antitrust liability for false statements (Bobrick Opp. 7, 9); incorrectly contend that coercion or threats must be shown to establish a restraint of trade (*id.* at 5); and inaccurately describe the cases cited for the deep circuit conflict as distinguishable because they involve false statements to intermediaries rather than to the ultimate consumer (*id.* at 11-17). To the contrary, petitioner does not "urg[e] this Court to expand the range of *per se* conduct actionable under the antitrust laws" (*id.* at 9), but rather to be allowed in private

antitrust litigation to pursue the same theories recognized in enforcement actions brought by the United States: that false disparagements of a competitor's product can be proof of an illegal restraint of trade. That question is exceptionally important, because it will provide needed guidance about the antitrust implications of a common form of anticompetitive conduct. The circuit conflict has festered long enough. This Court should resolve it now.

1. Respondents grossly mischaracterize petitioner's position as an argument "to expand the range of *per se* conduct actionable under the antitrust laws." Bobrick Opp. 1-2, 9, 18-19. Petitioner does not and has not contended that respondents' conspiracy to exclude petitioner from the marketplace by a campaign of intentional false disparagement should be judged solely under a *per se* theory and not under a rule of reason standard. To the contrary, petitioner here and below argued[1] and proffered evidence[2] that respondents' conspiracy violated § 1 of the Sherman Act because it had substantial anticompetitive effects in the marketplace, which is a traditional hallmark of a § 1 violation under the rule of reason.[3] Moreover, the district court specifically addressed (and ruled against) petitioner's arguments that such intentionally false statements about its products were material to proof of

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[1] *See* Brief of Appellant at 1, 9-12, 14-15, 31-53, No. 03-1845 (3d Cir. filed July 8, 2003); Reply Brief of Appellant at 14-21, No. 03-1845 (3d Cir. filed Sept. 15, 2003). Petitioner argued below, in the alternative, for *per se*, "quick look" rule of reason and traditional rule of reason theories of antitrust violation. *See* Pet. App. 103a-121a & nn.42, 48. Petitioner does not argue in this Court that respondents' conspiracy to exclude HDPE partitions from the market through a campaign of intentionally false statements is to be judged under a *per se* rule.

[2] *See* Pet. 4-5.

[3] *See, e.g., Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330-31 (1991) (collecting cases); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (where agreements are not *per se* violations, courts analyze whether conduct "has the potential for genuine adverse effects on competition").

antitrust liability under the rule of reason. *See* Pet. App. 109a-121a. This case therefore squarely raises the issue whether intentional false statements are immunized from scrutiny *under § 1's rule of reason.* It is also a proper vehicle for determining whether respondents' conspiratorial use of false statements to exclude competition can be found to be in *unreasonable restraint of trade.*

2. Respondents seek to evade the clear circuit conflict on whether intentionally false statements about a competitor's product can be evidence of actions in restraint of trade. They argue that decisions holding such product disparagements actionable under § 1 or § 2 of the Sherman Act arise in the context of additional exclusionary acts besides the false statements. But that fact pattern is present in this case as well. The Third Circuit's failure to consider the false statement facet of respondents' exclusionary conspiracy in the context of its remaining facets is the basis of petitioner's second question presented. *See* Pet. 24-26.[4] The two questions presented leave it open to this Court to decide *either* that concerted action to eliminate a competitive product from the marketplace by use of intentionally false statements can, of itself, form the gravamen of a § 1 rule of reason violation *or else* that such conduct may properly be considered as an element of a § 1 conspiracy employing (as here) that and additional forms of exclusionary conduct in unreasonable restraint of trade.[5]

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[4] Petitioner's first question presented is whether a conspiracy to exclude competition by means of intentionally false statements, where substantial adverse competitive effects in the relevant market occur, violates § 1. Compare *United States v. Singer Mfg. Co.*, 374 U.S. 174, 197, 200 (1963) (concurring opinion of White, J., maintaining that conspiracy to prevent prior art from coming to attention of Patent Office violates § 1), *with id.* at 190 n.7 (holding that such conduct along with other exclusionary acts violates Sherman Act).

[5] Petitioner believes that a conspiracy to exclude competition by means of intentionally false statements, where substantial adverse competitive effects in the relevant market occur, violates § 1 irrespective of whether additional exclusionary conduct occurs. The facts of

Moreover, respondents' distinction is a false one. As respondents concede (Bobrick Opp. 15-16), the Third Circuit held "that disparagement is *never* actionable because there is no restraint of trade," *id.* But if that standard is correct – and the Seventh Circuit agrees with the Third that it is – then the Second, Sixth, Eighth, and D.C. Circuits would have had no business considering such a non-restraint at all, whether by itself or when combined with other acts. The mere fact that the majority of circuits consider false disparagement as relevant evidence of an antitrust violation creates an irreconcilable conflict with the Seventh and Third Circuits, which consider such evidence "irrelevant." Pet. App. 14a. In the majority of circuits, this case would have been remanded for the district court to consider petitioner's evidence of false disparagement and its effect on competition.

3. Respondents apparently concede that their use of intentional false statements to exclude competition is actionable if accompanied by "coercion," but not otherwise. *See* Bobrick Opp. 2-3, 10-11. The argument, accepted below, is that intentionally false product disparagement, no matter how successfully exclusionary, is not a "restraint" of trade unless accompanied by coercive acts. That argument has no merit. Although cases have upheld Sherman Act violations where such coercion is present, Pet. 18 & n.23 (collecting cases), it is simply not necessary to prove force, physical constraint, brutality, or coercion as an element of an antitrust violation. In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), for example, Microsoft was found to have violated the antitrust law by lying to software programmers about the way Microsoft's software codes would interact with Java. *Id.* at 76-77. This case involves the same basic type of deceit.

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this case, however, *see* Pet. 24-25, involve other anticompetitive conduct such as an agreement not to make and sell HDPE partitions, which is illegally restrictive under *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20 (1912).

4. Respondents seek to distinguish this case from all other antitrust cases involving intentionally false product disparagement on the theory that those cases concerned deception of "intermediaries" while this case concerns deception of consumers. The argument fails on two grounds. First, this case does not involve deception of consumer end users but deception of architects who write bid specifications for schools and other public and nonpublic buildings. The architects do not themselves "use" the restroom partitions that were the subject of respondents' conspiracy. The users are the members of the public who use the restrooms or the taxpayers or building owners who ultimately pay for their construction. Respondents aimed their intentionally false statements at architects who were as much intermediaries as were the software programmers, travel agents, and other product conduits to ultimate consumers in the other decided cases. *See* Pet. 8-12.

Second, the distinction that respondents seek to establish between intermediaries and ultimate consumers lacks any rational basis. Intentional false statements are equally without redeeming social or economic value whether aimed directly at the consuming public or indirectly at them via intermediaries.[6] The false statements

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[6] "False advertising cannot help consumers, and hence cannot be defended as beneficial to competition." *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 371 (6th Cir. 2003). Respondents incorrectly contend that the *Podiatric* case eliminates the Sixth Circuit (per *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002)) as a conflicting circuit. Not so. The *Podiatric* case actually emphasizes and heightens the conflict discussed in the petition. In that case, the Sixth Circuit dismissed the Sherman Act § 1 claim for lack of a conspiracy, *see* 323 F.3d at 369, but held that similar legal principles governed § 1 and § 2 in this context, although the standard of proof was necessarily different, *id.* at 373 n.10. The § 2 charge failed for several reasons. First and most important, all of the challenged statements were, at worst, either ambiguous or true but misleading rather than, as is conceded here, intentionally false. *Id.* at 369. In fact, there was no "evidence of actual deception." *Id.* Second, there was no anticompetitive effect because the defendant's true but misleading statements were

harm the public and the competitive process in the same way and to the same extent, regardless of the route used by the conspirators to transmit their falsehoods. Either way, the false statements exclude an innovative, cheaper product from the marketplace, which leads to higher prices in the relevant market and deprives the public of the benefits of free and open competition.

5. Respondents' attempt (*see* Bobrick Opp. 23) to overcome the conflict between the decision below and the United States' enforcement policies is also unpersuasive. The fact that the U.S. has not intervened in this case is irrelevant. It is uncommon for the U.S. to intervene in private antitrust litigation. The far different – and more relevant – question is whether the U.S. agrees with the Third Circuit's holding that intentionally false statements that adversely affect competition are never relevant or actionable under the antitrust laws. For more than four decades, the U.S. has said otherwise.

6. Respondents quarrel at length with the summary judgment posture of the record. *See* Bobrick Opp. 19-23. They argue that they had countervailing evidence that could prevail on remand, and that there are alternative, potentially dispositive theories on which they might have prevailed even though the Third Circuit did not attempt to address them. *Id.* at 19. Respondents point to conflicting proffers of evidence on the market impact of the conspiracy and to inferences that could be drawn in their favor. None of that is relevant given the posture in which this case comes to the Court. Respondents will have their chance to argue their evidence in due course, if this Court grants the petition and reverses the Third Circuit's judgment. The only issue before the Court at this time is the correctness of the Third Circuit's judgment that false dis-

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readily, cheaply, and effectively curable and counteracted. *Id.* at 370, 372. Nothing in *Podiatric* contradicts what the Sixth Circuit had held in *Conwood*, namely, that the use of "misleading" information that "misrepresent[ed] sales activity" could be relevant evidence of an antitrust violation. *See* Pet. 11-12.

paragements can never be actionable under the antitrust laws. Because the case comes to this Court as a summary judgment against petitioner, all of the evidentiary inferences have to be drawn in petitioner's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

Petitioner proffered ample evidence that respondents' conspiracy[7] to exclude petitioner's cheaper, innovative competitive product[8] from the marketplace, by means of a campaign of intentionally false statements,[9] had a substantial adverse effect on competition. *See* Pet. 2-5.[10] In addition, petitioner proffered evidence that the cost to it of trying to neutralize respondents' campaign of falsehood greatly exceeded respondents' costs in spreading the falsehoods, making it ineffective to counteract the campaign. Pet. 20-21 & n.29.[11] Furthermore, contrary to re-

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[7] The district court found sufficient concerted action for § 1 purposes. *See* Pet. App. 102a. The court of appeals so stated and added that this finding went unchallenged on appeal. *See id.* at 12a n.14. Nowhere in the briefs in opposition is conspiracy denied.

[8] *See* Pet. 2 n.3. Nowhere in their briefs in opposition do respondents deny that they aimed their campaign of intentionally false product disparagement at a cheaper, innovative product to remove it from the marketplace.

[9] *See* Pet. 3 n.4. Nowhere in the briefs in opposition is intentional falsehood denied.

[10] We cite (Pet. 4-5) petitioner's proffered evidence that its cheaper, innovative product rapidly gained market share at the expense of respondents' conventional product until the conspiracy became effective (1990), then plateaued during the period of the conspiracy (1990-1994), and resumed growth after the conspiracy petered out. These events are dramatically illustrated, *infra* at 1a, in a redacted version of C.A. App. 11675. (The unredacted version of this exhibit is a part of the record under seal, and it shows dollar amounts deleted here.)

[11] This ease-of-neutralization factor has been added to the analysis only in cases involving monopoly power under § 2, and not in regard to § 1 with its lesser standard of proof. *Compare National Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988)